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IN THE SUPREME COURT OF THE STATE OF GEORGIA

No. 33823

FRANK BENIS, ALIAS FRANK BIENERT,
Plaintiff in Error,

vs.

STATE OF GEORGIA,
Defendant in Error

FROM THE COURT OF APPEALS OF GEORGIA

SEPARATE JURISDICTIONAL STATEMENT ACCOMPANYING PRESENTATION OF PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES, AS REQUIRED BY RULE 12 OF SAID COURT

The basis upon which petitioner contends that the Supreme Court of the United States has jurisdiction of the appeal in this case (which this statement accompanies) is that petitioner was illegally convicted in the City Court of Macon, Georgia, of violating a statute of the State of Georgia, which was not a penal statute and did not make the act petitioner was charged with committing a criminal offense, over petitioner's objection that his conviction under said statute, as construed by the court, would deprive him of his property without due process of law, in violation of his

rights as a citizen under the Fourteenth Amendment to the Constitution of the United States.

Petitioner contends that the Supreme Court of the United States has jurisdiction of this appeal under the provisions of Section 1257 (2) of Title 28, U. S. Code Annotated, in that petitioner contended from the outset in the trial court that the Georgia statute he was charged with having violated did not charge any offense against the State of Georgia, and was repugnant to the Constitution of the United States, and particularly to the Fourteenth Amendment thereto. The Supreme Court and the Court of Appeals of Georgia have rendered decisions in this case contrary to such contentions of petitioner.

The statute petitioner is charged with violating is Section 1025 of Title 58 of the Code of Georgia of 1933.

On February 24, 1949, the Solicitor of the City Court of Macon filed against petitioner the following accusation:

> ". . . the said Frank Benis, alias Frank Bienert on the 3 day of July in the year Nineteen Hundred and 48 in the County aforesaid; did then and there unlawfully being manager and employee of Dodd Distributing Company, a wholesale liquor distributor authorized to sell distilled spirits at wholesale to the holder of a wholesale liquor license and a retail liquor license, sell to Troy F. Turner certain distilled spirits and whiskey, the said Troy F. Turner not being the holder of a retail liquor license and a wholesale liquor license."

The sections of the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors petitioner was charged with violating in said accusation are Sections 1025 and 1069 of Chapter 58-10 of the 1933 Code of Georgia. These two sections are quoted verbatim as follows:

> "A wholesaler's license shall authorize the holder to engage in the sale of distilled spirits at wholesale, by selling to the holder of a wholesale license or to the holder of a retail license for the purpose of resale. Said

license fee shall be $1,000 annually. Said licenses shall be renewed annually on or before the first day of January."

Section 1025, Title 58, 1933 Code of Georgia Annotated.

"Whoever violates any of the provisions of this Chapter for which no specific penalty is provided, or any of the rules and regulations issued under authority of this Chapter, and in accord with the provisions of this Chapter, shall be guilty of a misdemeanor, and upon conviction shall be punished as for a misdemeanor as provided in Section 27-2506."

Section 1069, Title 58, 1933 Code of Georgia Annotated.

To this accusation petitioner filed his demurrer and moved the court to dismiss the accusation on the following grounds:

"(1) Because said accusation is fatally defective and insufficient in law to charge the commission of any penal offense under the laws of this State by this defendant.

"(2) Because the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors does not make a sale of distilled spirits and whiskey by a duly licensed wholesale liquor distributor to a person other than the holder of a wholesale liquor license or the holder of a retail liquor license a penal offense.

"(3) Because the said Revenue Tax Act does not declare it to be unlawful for a duly licensed wholesale liquor distributor to sell distilled spirits and whiskey to a person other than a holder of a wholesale liquor license or a holder of a retail liquor license.

"(4) Because said accusation seeks by implication to make penal an act, the doing of which by this defendant the said Revenue Tax Act omits to forbid as unlawful.

"(5) Because a conviction of the defendant on an invalid accusation will deprive him of his liberty or property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the

United States, which provides: '. . . nor shall any state deprive any person of life, liberty or property without due process of law,' and also in violation of Article I, Section 1, Par. 3 of the 1945 Constitution of the State of Georgia (Section 2-103 of the 1933 Code of Georgia), which provides: 'No person shall be deprived of life, liberty or property except by due process of law.' "

Petitioner's demurrer was overruled by the trial court upon each and every ground thereof on the 18 day of April, 1951, to which ruling and judgment of the trial court petitioner then and there excepted by bill of exceptions pendente lite and assigned error thereon in his bill of exceptions sued out to the Court of Appeals of Georgia.

The Court of Appeals affirmed the judgment of the trial court on January 24, 1952, and denied petitioner's motion for rehearing on February 19, 1952.

A copy of said opinion of the Court of Appeals of Georgia, reported in 69 S. E. (2d), No. 3 Advance Sheets, dated March 27, 1952, at page 300, is appended hereto. (Exhibit A.)

At this point an explanatory statement considered material to this petition for appeal is given.

There is reported in the 82nd volume of the Reports of the Court of Appeals of Georgia, at page 179, the case of *Bienert* v. *State*, decided May 16, 1950. This reported case involves the same transaction as the case now under consideration, but the two cases are separate and distinct cases, based upon separate and distinct accusations, with different defensive pleadings and different assignments of error.

The case reported in 82 Ga. App. 179 was taken by writ of error from the City Court of Macon to the Court of Appeals on exceptions to the judgment of the trial court overruling petitioner's general demurrer to the accusation. This demurrer contained no ground that the conviction of petitioner

on an invalid accusation would deprive him of his liberty or property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States, and no Federal constitutional question was made or argued in this first case. A copy of the opinion of the Court of Appeals of Georgia, reported in 82 Ga. App. 179, is hereto appended. (Exhibit B.)

The case reported in 82 Ga. App. 179 arose out of accusation No. 56286, filed in the City Court of Macon against Frank Bienert on March 3, 1949. No trial was ever had on accusation No. 56286. The accusation upon which petitioner was convicted is accusation No. 56243, filed in the City Court of Macon, Georgia, against Frank Benis, alias Frank Bienert, on February 24, 1949.

This explanatory statement is made for the purpose of calling the Court's attention to the fact that the decision of the Court of Appeals of Georgia of May 16, 1950, is not the law of the case under consideration, and the demurrer in this case raised the Federal constitutional question which the Court of Appeals of Georgia did not have before it in the first case.

Petitioner applied to the Supreme Court of Georgia for a writ of certiorari to the Court of Appeals of Georgia to review and reverse its decision of January 24, 1952, in which a rehearing was denied February 19, 1952, and on April 16, 1952, the Supreme Court of Georgia entered a judgment denying petitioner's application for certiorari.

Petitioner cites as sustaining the jurisdiction of the Supreme Court of the United States in this cause the following cases:

Musser v. *State of Utah*, 333 U. S. 95, 92 L. ed. 562;
Winters v. *People of State of New York*, 333 U. S. 507, 92 L. ed. 840;
Hammerstein v. *Superior Court of California*, 341 U. S. 491, 95 L. ed. 1135.

Petitioner appends to this statement, in addition to copies of decisions of the Court of Appeals of the State of Georgia, copies of sections of the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors (Georgia Laws 1937-38 Extra Session, pages 103-124) appearing in the 1933 Code of Georgia as Sections 58-124, 58-306, 58-1077 and 58-1078. (Exhibit C.)

The fact that at the time of the commission of the alleged offense Bibb County, Georgia, was what is called a wet county, in which the provisions of the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors was in full force and effect, is judicially recognized by the Georgia courts, and the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors repealed or suspended in wet counties all provisions of the State Prohibition Law applicable in dry counties of the State.

Leonard v. *State of Georgia*, 204 Ga. 465;
Section 58-124, Code of Georgia of 1933;
Section 58-305, Code of Georgia of 1933;
Section 58-1078, Code of Georgia of 1933.

Petitioner realizes that the sole concern of the United States Supreme Court in petitioner's case is to see to it that no conviction contrary to a valid objection raised under the Fourteenth Amendment to the Federal Constitution is upheld, and it is to this concern of the highest court of the land for the rights of the citizen that petitioner appeals.

This 13 day of June, 1952.

WALLACE MILLER,
WALLACE MILLER, JR.,
MILLER, MILLER & MILLER,
Attorneys for Frank Bienert,
Petitioner.

P. O. Address:
515 Persons Building,
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EXHIBIT "A"

BIENERT v. STATE

No. 33823

Court of Appeals of Georgia, Division No. 2

Jan. 24, 1952

Rehearing Denied Feb. 19, 1952

The defendant was convicted in the City Court of Macon, Cecil A. Baldwin, J., for the unlawful sale of whisky at wholesale to a person holding no retail or wholesale liquor license, and he brought error. The Court of Appeals, Townsend, J., held that where the undisputed evidence, including defendant's statement, disclosed that an officer of the alcohol control unit of the State Revenue Department furnished the defendant with the opportunity to commit the crime, that the persuasion of the officer was usual and ordinary only as opposed to being a strong appeal on humanitarian or other unusual extraordinary grounds, that the defendant was ready and willing to commit the crime, and that the defendant was suspected of committing similar offenses, the defense of entrapment was, as a matter of law, not available to defendant.

Affirmed.

1. Intoxicating Liquors Key No. 222:

An accusation of violating Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquor by selling whisky wholesale to person not holding retail or wholesale liquor license, charged commission of penal offense under state laws and was sufficient without negativing ways in which lawful sale might have been made. Ga. Code Ann. Section 58-1025.

2. Intoxicating Liquors Key No. 224:

Rule that the law presumes that every act which is itself unlawful was criminally intended unless the contrary is

made to appear, applies in misdemeanor cases, such as illegal sales of liquor, which are not malum in se but only malum prohibitum.

3. Intoxicating Liquors Key No. 150:

A person upon whom federal occupational tax for retailing liquor is levied may or may not be holder of wholesale or retail liquor license, and hence if purchaser of whisky at wholesale, although the holder of a federal permit, is not holder of wholesale or retail license, sale is illegal. Ga. Code Ann. Section 58-1025; 26 U. S. C. A. Section 3250 (b).

4. Criminal Law Key No. 32:

Ignorance of the law is not an excuse for its violation.

5. Criminal Law Key No. 37:

"Entrapment" exists where the idea and intention of commission of a crime originates with an officer of the State, and officer, by undue persuasion, incitement and deceitful means, induces defendant to commit an act which defendant would not have committed except for conduct of such officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

6. Criminal Law Key No. 37:

Where a person is suspected of being a violator of the law, a trap may be set and suspected person given such opportunity to violate law as would be usual and ordinary under the circumstances.

7. Criminal Law Key No. 37:

In prosecution for sale of whisky by wholesale liquor distributor to a person who was not holder of retail or wholesale liquor license, in violation of Revenue Tax Act to Legalize and Control Alcoholic Beverages, where undisputed evidence, including distributor's statement, disclosed that an officer, of Alcohol Control Unit of State Revenue Department merely furnished distributor with opportunity to

commit the crime, that the persuasion of officer was usual and ordinary only as opposed to being a strong appeal on humanitarian or other unusual or extraordinary grounds, that distributor was ready and willing to commit crime, and that distributor was suspected of committing similar offenses, defense of entrapment was, as a matter of law, not available to distributor.

8. Criminal Law Key No. 1162:

Error is harmless where verdict, as rendered, was demanded by evidence and defendant's statement.

Syllabus by the Court

1. The accusation, which is based on Chapter 58-10 of the Code Supplement, specifically charges the unlawful manner in which the sale of spirituous liquors in a wet county was made, and is therefore sufficient to withstand demurrer.

2. The rule that the law presumes that every act which is itself unlawful was criminally intended unless the contrary is made to appear applies in misdemeanor cases which are not malum in se.

3. Where, as here, the undisputed evidence, including the defendant's statement, discloses that an officer merely furnished the defendant the opportunity to commit the crime, that the persuasion of the officer was usual and ordinary only as opposed to being a strong appeal on humanitarian or other unusual or extraordinary grounds, that the defendant was ready and willing to commit the crime, and that the defendant was suspected of committing similar offenses, the defense of entrapment is, as a matter of law, not available to such defendant.

4. Error is harmless where the verdict, as rendered, was demanded by the evidence and the defendant's statement.

On February 24, 1949 the accusation in this case was filed in the City Court of Macon, charging one Frank Benis, alias Frank Bienert, with a violation of the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquor in

that, being manager and employee of Dodd Distributing Company, a wholesale liquor distributor, did on July 3, 1948, illegally sell whisky to one Troy F. Turner who was not the holder of a retail liquor license or of a wholesale liquor license. The accusation refers to the same transaction and is identical with an accusation filed against the same defendant in the same court on March 3, 1949, and which was held not subject to demurrer by this court in Bienert v. State, 82 Ga. App. 179, 60 S.E. 2d 575. Demurrers to the accusation here were filed and overruled and exceptions pendente lite preserved. No trial was held on the accusation of March 3, 1949. A trial on the accusation here before the court was held and a verdict of guilty returned on April 24, 1951. The defendant made a motion for a new trial on the general grounds, which was later amended by the addition of 22 special grounds. The exceptions are to the overruling of the demurrer to the accusation and to the overruling of the motion for a new trial as amended.

Wallace Miller, Jr., and Miller, Miller & Miller, all of Macon, for plaintiff in error.

O. L. Long, Sol., Macon, for defendant in error.

Townsend, Judge (after stating the foregoing facts).

(1) 1. It is contended by the plaintiff in error that the accusation here is fatally defective in that it does not negative all of the lawful ways under which the defendant might have sold the liquor in question, under the authority of Capitol Distributing Co. v. State, 83 Ga. App. 303, 63 S.E.2d 451, 452. It is contended by the defendant in error that the accusation has been previously held by this court to be sufficient, and that this has become the law of the case, in Bienert v. State, supra. The two accusations, although identical, represent two different cases. However, the accusation in the Bienert case specifically charges a violation of Code Supp. Section 58-1025, in that it charges the defendant, as general manager of a liquor company holding a wholesaler's license, with sale to one not the holder of either a wholesale or retail liquor license, these being the only two licensees, under said code section, to whom a wholesaler may

lawfully sell. The Capitol Distributing Co. case, on the contrary, while alleging that the defendants were not the holders of retailers' licenses, failed to allege what license, if any, the defendants held, for which reason the indictment was held to be ambiguous, since it was impossible to say with any certainty whether the State intended to charge violations of wholesaler's licenses, violations of licenses to manufacture, or sales without licenses of any kind. The headnote of that case states as follows: "An indictment based on Chapter 58-10 of the Code Supplement in which it is attempted to charge the unlawful sale of spirituous liquors in a wet county, must either specifically charge the unlawful manner in which the sale was made or it must negative all methods by which such sales may be legally consummated." The accusation here, and in Bienert v. State, supra, specifically charge the unlawful manner in which the sale was made by charging a violation of Code Supp. Section 58-1025, while in Capitol Distributing Co. v. State, supra, the indictment neither specifically charged the unlawful manner in which the sales were made, nor did it negative all legal methods by which they could have been consummated. The accusation here is accordingly sufficient to withstand the motion to quash directed against it.

(2-4) 2. It is contended in the first ground of the amended motion for a new trial that a charge that "The law presumes that every act which is itself unlawful was criminally intended unless and until the contrary is made to appear" is not applicable in cases such as illegal sales of liquor, which are not malum in se but only malum prohibitum. The excerpt of the charge is complained of as error because the defendant contends that the evidence demands a finding that the purchaser of the whisky, who was an agent of the State Revenue Department, represented himself to be an agent of the V. F. W. Club of Laurens County, which organization the defendant believed to be the holder of a "Federal permit" (by which the defendant apparently was referring to the Federal Occupation tax levied against retail dealers in liquor, U.S.C.A. Tit. 26, Section 3250(b) and as such entitled to purchase whisky. The defendant was the manager of Dodd Distributing Company, a licensed wholesale liquor

dealer, and as such authorized to sell whisky at wholesale only to the holders of either wholesale or retail liquor licenses. One upon whom the Federal occupational tax for retailing liquor is levied may or may not be the holder of such licenses. It follows therefore, that under Code Supp. Section 58-1025, if the purchaser, although the holder of a "Federal permit", was not the holder of a wholesale license and was not the holder of a retail license, the sale would be illegal. Ignorance of the law is not an excuse for its violation. Coleman v. City of Griffin, 55 Ga. App. 123, 189 S. E. 427; Ware v. State, 6 Ga. App. 578, 65 S.E. 333. It is not contended by the defendant that he did not intend to commit the act of selling to a person who was not the holder of a proper State license and who did not represent the holder of a proper license. He contends that he intended to commit the act, but that he did not know it to be unlawful. The principle upon which the excerpt complained of is based may be found in Lawrence v. State, 68 Ga. 289. It has been applied to statutory misdemeanors not malum in se. Balark v. State, 81 Ga. App. 649 (1-a), 59 S.E. 2d 524. See also Herbert v. State, 45 Ga. App. 340, 164 S.E. 452; Frazier v. State, 27 Ga. App. 261, 107 S.E. 896; Biddy v. State, 22 Ga. App. 784, 97 S.E. 196. This ground is without merit.

3. Special grounds 3 through 17 complain of errors in the charge of the court and failures to charge as requested in relation to the principle defense, that of entrapment. Taking the evidence and the defendant's statement in its light most favorable to the defendant for the purpose of considering whether any errors in the charge on entrapment, if made, would have required a reversal of this case, it appears that a request was made by the Retail Whiskey Dealers' Association to the Alcohol Control Unit in connection with alleged price violations; that pursuant thereto an employee of the Alcohol Control Unit of the State Revenue Department went to Macon and, after conferring with the attorney for the Retail Whiskey Dealers' Association and learning that the defendant or his company was suspected of making sales to persons not regularly licensed by the State, he went to the offices of Dodd Distributing Company, arriving just a few minutes before closing time on the Satur-

day noon preceding the long Fourth of July weekend; that he represented himself to be the agent of the V. F. W. Club of Laurens County, holder of a "Federal permit" and that he needed a case of whisky for the Club's Fourth of July celebration; that the defendant at first refused to sell him the whisky but later reconsidered and sold him one case; that he did not make any inquiry whatever as to whether either the witness or his Club were holders of either a wholesale or a retail license. The evidence further showed that the company of which the defendant was general manager made large and regular sales to persons in dry counties, some of whom were identified by witnesses as being bootleggers. It is not contended that the defendant was under the impression, when he made the sale, that the purchaser or the club he purported to represent did hold any State license which would have made the sale legal.

(5,6) In Sutton v. State, 59 Ga. App. 198 (1, 2, 3), 200 S.E. 225, it is held as follows: "The discovery of crime and the procurement of evidence by deception are not prohibited. A trap may be set. It is no 'entrapment' to commit a crime where the officer merely furnishes an opportunity to a criminal who is ready to commit an offense. 'Entrapment' exists where the idea and intention of the commission of a crime originates with an officer of the State, and he, by undue persuasion, incitement and deceitful means, induces the defendant to commit an act (in violation of the literal terms of the prohibition law), which the defendant would not have committed except for the conduct of such officer." Where one is suspected of being a violator of the law, a trap may be set, and the suspected person given such opportunity to violate the law as would be usual and ordinary under the circumstances. U. S. v. Wray, D. C., 8 F. 2d 429; Dalton v. State, 113 Ga. 1037, 39 S.E. 468.

(7) Thus, where an intention to commit a crime originates with the accused, or where, in the case of law violations of the same kind, the accused is suspected of carrying on a series of like offenses, it is permissible to set a trap by offering the suspected person an "opportunity to transgress", the prohibition being imposed, however, that the temptation must not be extraordinary or the persuasion undue so that

the defendant, by reason of the excessive reward offered, or perhaps by strong appeal to humanitarian or other motives, is compelled to do an act which he would not otherwise have done. Under these circumstances the defense of entrapment is good and a conviction unauthorized. But where, on the contrary "the officer merely furnishes an opportunity to a criminal who is ready to commit an offense", it does not constitute an entrapment. It does not appear here that any excessive temptation or persuasion of the type contemplated was offered. The price received was the regular wholesale price for the liquor involved. In fact, the only persuasion involved, and this is denied by the witness and appears only in the statement of the defendant, was that the liquor was to be used for a Fourth of July celebration by a club known to the defendant, and that it would be too late to purchase the liquor elsewhere, at wholesale prices. It does not appear that this argument, addressed to one engaged exclusively in the purchase and sale of wholesale liquor, would be undue, unusual or excessive. Accordingly, the version of the evidence most favorable to the defendant fails to meet the requirements of the defense of entrapment.

(8) 4. Since the defendant's main defenses, namely, that he did not intend to violate the law by making the sale under investigation, which he thought was to the holder of a "Federal permit" and therefore legal, and that he was entrapped, are held herein not to constitute good defenses in law under the evidence of this case, and since the defendant admitted the sale under consideration, a verdict of guilty was demanded. For this reason the remaining grounds of the amended motion for a new trial are not considered, as they would at most constitute harmless error. Miller v. State, 69 Ga. App. 847 (2), 26 S.E. 2d 851; Davis v. State, 77 Ga. App. 541, 49 S.E. 2d 173; Hagar v. State, 71 Ga. 164.

The trial court did not err in overruling the demurrers to the accusation or in overruling the motion for a new trial as amended.

Judgment affirmed.

MacIntyre, P. J., and Gardner, J., concur.

MacIntyre, Presiding Judge (concurring specially)..

Under the Alcohol Control Act there are only three kinds of licences issued by the State and each limits the authority of the holder thereof and in the absence of one of these licences a person cannot sell a prohibited liquor even in a wet county. The three kinds of licences are: (1) a manufacturer or distiller is authorized to sell to another manufacturer or distiller only in bulk and he can sell to a licenced wholesale in sealed containers, Code Anno. Supp. Section 58-1024; (2) the holder of a wholesale licence is authorized to sell to another licenced wholesaler and to a licenced retailer for purposes of resale, Code Anno. Supp. Section 58-1025; (3) the holder of a retail licence is authorized to sell to consumers in certain amounts in unbroken packages, Code Anno. Supp. Section 58-1026. The distinction between the indictment in the present case and the indictment in the case of Capitol Distributing Co. v. State, 83 Ga. App. 303, 63 S.E. 2d 451, is that here the indictment alleged a specific violation of Code Anno. Supp. Section 58-1025, but in the Capitol Distributing Company case the indictment alleged that the defendant was not the holder of a retail licence and that the purchaser was not the holder of a wholesale or retail licence. It did not charge that the defendant had no licence of any kind, but simply charged that the defendant had a retail licence, leaving it an open question whether he had a manufacturer's or a wholesaler's licence. It then charged that the purchaser was not the holder of a wholesaler's or retailer's licence, leaving it an open question whether he had a manufacturer's licence. Thus in the Capitol Distributing Company case, the indictment undertook specifically to negative the fact that the accused had any of the three kinds of licences provided by law as stated above, in the absence of which the defendant could not legally sell the prohibited liquor in question; and, having failed to negative the fact that the defendant had a manufacturer's licence and that the purchaser had a manufacturer's licence, the indictment was defective as being ambiguous, for a person with a manufacturer's licence could legally sell to another person with a manufacturer's licence.

Just a word as to one of the ways in which the pleadings may be drawn so as to present the issues to the jury in a

clear and easily understood way in the case of a violation of our general prohibition law—The general prohibition law as contained in Code Sections 58-101, 58-202, et seq., generally known as the "bone dry" law, is of force and effect in every county of this State, except to the extent that the prohibited liquors have been legalized under the limitations and restrictions of statutes or of statutes and elections held in conformity with them in the individual counties. Under the bone dry law, prior to the Act of 1937-38, Ga. L. 1937-38, Ex. Sess., p. 103, an indictment which alleged that the accused sold one of the prohibited liquors on a named date in a named county in Georgia was a good indictment and not subject to demurrer, but the Act of 1937-38, which act itself specifically states it is amending the bone dry law, further states in Section 1 that "This Act shall be known as the 'Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors.'" In what counties is such amendatory act to legalize and control such beverages and liquors? I think in all counties of this State, both wet and dry and not in wet counties alone, for it legalizes and controls certain of such liquors in dry counties under certain restrictions and limitations; otherwise, one quart of such prohibited liquors could not be legally possessed in a dry county, even under the limitations and restrictions provided in such act. The passage of the Act of 1937-38 amended the bone dry law and when it was thus amended it became one general law with many exceptions, and none of the exceptions come within the enacting clause of the general prohibition law as it existed prior to such amendment, but all such exceptions are placed in subsequent sections or subsequent statutes, separate from that of the enacting clause and need not be included in an accusatory pleading. When a person comes within an exception, it is a matter of defense. For "it is a long established and well settled rule that where the exception is placed in a section or statute separate from that of the enacting clause, it is a matter of defense and need not be noticed in the accusatory pleading." 153 A.L.R. 1292. In this annotation just cited, the annotator cites many of the cases from the Supreme Court of this State and from this court in support of the rule quoted, among which is Williams

v. State, 89 Ga. 483, 15 S.E. 552, which is strikingly in support of this rule. See concurring opinion of this writer in Capitol Distributing Co. v. State, supra, and Colbert v. State, 80 Ga. App. 641, 642, 56 S.E. 2d 830, and particularly Bienert v. State, 83 Ga. App. 303, 306, 63 S.E. 2d 451. Therefore, in the present case if the indictment had alleged after the formal parts thereof that the said Frank Bienert on a date named in a named county in Georgia did sell a named prohibited liquor, it would not be subject to demurrer. Such an accusatory pleading (indictment), coupled with a plea of not guilty, would have been sufficient pleading upon which to try such a case. If the defendant did not sell the prohibited liquors, he could prove it and the case would be disposed of. If he did sell such liquors, he could say he sold them but that he sold them under an exception to the bone dry law that allowed him so to do and on proof that he came within such exception, the case would be disposed of. If this is a legal way to dispose of such a case, and I am firmly convinced it is, much excess and superfluity of pleading would be dispensed with and the jury would more easily and clearly understand the issues involved.

—69 S. E. (2d), No. 3 Advance Sheets, dated March 27, 1952, at page 300.

EXHIBIT "B"

32928. BIENERT v. THE STATE

The accusation charged the commission of a penal offense under the laws of this State and the court did not err in overruling the demurrer thereto.

Decided May 16, 1950. Rehearing denied July 28, 1950.

Violating liquor law; from Macon City Court—Judge Baldwin. January 3, 1950. (Application to Supreme Court for certiorari.

The defendant, Frank Bienert, was accused of the offense of violating the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors for that he "on the 3rd day of July, in the year nineteen hundred and forty-eight, in

the county aforesaid (Bibb); did then and there unlawfully, being manager and employee of Dodd Distributing Company, a wholesale liquor distributor authorized to sell distilled spirits at wholesale to the holder of a wholesale liquor license and a retail liquor license, sell to Troy F. Turner certain distilled spirits and whisky, the said Troy F. Turner not being the holder of a retail liquor license and a wholesale liquor license." To this accusation the defendant filed the following demurrer: "Because said accusation is fatally defective and insufficient in law to charge the commission of any penal offense under the laws of this State by this defendant; because the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors does not make a sale of distilled spirits and whisky by a duly licensed wholesale liquor distributor to a person other than the holder of a retail liquor license, a penal offense. Because said Revenue Tax Act does not declare it to be unlawful for a duly licensed wholesale liquor distributor to sell distilled spirits and whisky to a person other than a holder of a wholesale liquor license or a holder of a retail liquor license; because said accusation seeks by implication to make penal an act the doing of which by this defendant the said Revenue Tax Act omits to forbid as unlawful." The demurrer was overruled and the defendant comes to this court upon exception to that judgment.

Miller, Miller & Miller, for plaintiff in error.

Arnall, Golden & Gregory, Candler, Cox & McClain, Edward Andrews, Smith, Kilpatrick, Cody, Rogers & McClatchey, Morgan Belser, Kurt Holland, as amici curiae.

Oscar L. Long, Solicitor, contra.

MacIntyre, P. J. Georgia as a whole is a dry State and the general prohibition law as contained in Code Sections 58-101, 58-102, et seq., generally known as the "bone dry" law, is in force and effect in every county of the State unless the prohibited liquors have been legalized by statute or statute and election held in conformity with the statute in the individual counties. Prior to the effective date of the act of 1937-38 (Ga. Laws, 1937-38, Ex. Sess. p. 103), the sale of distilled spirits and whisky was a violation of the

prohibition law. Bibb County, the county in which the crime was alleged to have been committed had held, under the provisions of the act of 1937-38 (Ga. Laws, 1937-38, Ex. Sess. p. 103), an election and the county had voted "wet"; that is it had voted to legalize and control in such wet county the liquors described in the act; and, distilled spirits and whisky, being described in the act, are some of the liquors which are legalized and controlled by the provisions of the act. One of the controls provided for in the act is that a wholesaler must have a wholesaler's license which "shall authorize the holder to engage in the sale of distilled spirits (which includes whisky) at wholesale by selling to the holder of a wholesale license or the holder of a retail license for the purpose of resale. Code (Ann. Supp.), Section 58-1025. This being a dry State, the reason why a wholesaler, as such, can sell distilled spirits (which includes whisky) to anyone is that the provisions of the act of 1937-38 (Ga. Laws, 1937-38, Ex. Sess. p. 103) gives him such a right, if he obtains a license as provided by the act. If this provision is not complied with by obtaining a wholesaler's license, a wholesaler, as such cannot sell the prohibited liquors to anyone. If that provision is complied with, he may, as plainly stated in such provision, sell to another wholesaler or retailer holding a proper license. By this provision, he is made an exception to; that is, he is removed from the operation of the general law as to these purchasers, but as to none other. Frierson v. State, 67 Ga. App. 829 (21 S. E. 2d, 438); Garrett v. State, 71 Ga. App. 449 (31 S. E. 2d, 244). The general prohibition law (Code Section 58-101 et seq., as amended by the act of 1937-38, p. 103) is one law with a local option feature. See Crabb v. State, 88 Ga. 584, 588 (15 S. E. 455); Wheat v. Bainbridge, 168 Ga. 479, 480 (148 S. E. 332); Mayes v. Daniel, 186 Ga. 345, 356 (198 S. E. 535), and is a general law as it relates to both counties, dry and wet. It provides that in any county having an election as provided in the amendatory act of 1937-38 (Ga. Laws, 1937-38, Ex. Sess. p. 103), where "a majority of the votes cast shall be in favor of taxing and controlling alcoholic beverages and liquors, the manufacture, possession, distribution, and sale of such alcoholic

beverages and liquors in such county shall be permitted in accordance with the provisions of this Chapter." Code (Ann. Supp.), Section 58-1008, meaning in accordance with the provisions of the general prohibition law (Code Section 58-101 et seq. as amended by the act of 1937-38 (Ga. Laws, 1937-38, Ex. Sess., p. 103).

No statute has been adopted since the Code of 1933 purporting to authorize the sale of distilled spirits without a license from some authority and this is true even as to counties where the sale is not prohibited by the act of 1937-38 (in wet counties). Distilled spirits and whisky are still prohibited liquors under Code Section 58-101 et seq., as amended by the act of 1937-38 (Ga. Laws, 1937-38 et seq., p. 103), in any county where the sale is not prohibited (in wet counties) if the party selling has not obtained a license as provided by law. In other words, the sale must be in a county where it is not prohibited and the seller must also have a license permitting him to sell it in order for the sale of the distilled spirits to be removed from the operation of the law as stated in Code Section 58-101 et seq., and amended by the act of 1937-38. See, in this connection, Sprayberry v. Wyatt, 203 Ga. 27, 35 (45 S. E. 2d, 625). The amendatory act of 1937-38 (Ga. L. 1937-38, Ex. Sess., p. 103), states that it shall be known as the Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors and provides: "Licenses which may be issued under the authority of this Chapter shall be as set forth in sections 58-1024 to 58-1026 (Section 58-1024, to manufacturers; Section 58-1024, to wholesalers; Section 58-1026, to retailers). Code (Ann. Supp.), Section 58-1023. Code (Ann. Supp.), Section 58-1025 provides: "A wholesaler's license shall authorize the holder to engage in the sale of distilled spirits at wholesale, by selling to the holder of a wholesale license or to the holder of a retail license for the purpose of resale." Thus a wholesaler, as such, cannot obtain a license to sell distilled spirits except to another wholesaler who holds a license or to a retailer who holds a license, for purposes of resale, and if he cannot obtain a license for any other purpose and he sells to some other person the sale to such other person is not removed from the operation of the law as stated in Code

Section 58-101 et seq., as amended by the act of 1937-38 (Ga. Laws, 1937-38, Ex. Sess., p. 103). We think, therefore, that the accusation charges the commission of a penal offense under the laws of this State and is not subject to the demurrer.

Judgment affirmed. Gardner and Townsend, JJ., concur.

On Motion for Rehearing

MacIntyre, P. J. The act of 1937-38 (Ga. L. 1937-38, Ex. Sess., p. 103) in its title and in its body expressly states that it is an amendatory act, and when we certified a question relative to such act to the Supreme Court, in answering the question, that court, in Pierce v. State, 200 Ga. 384, 386 (37 S. E. 2d, 201), stated: "The act approved February 3, 1938 (Ga. L. 1937-38, Ex. Sess., p. 103), known as the 'Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors,' very substantially *amended* the then-existing prohibition law in certain respects." (Emphasis added.) We are convinced therefore that the act of 1937-38 is an amendatory act.

The case of Leonard v. State of Georgia, ex rel. Lanier, 204 Ga. 465 (50 S. E. 2d, 212), cited by counsel for the defendant, does not hold that the general prohibition law, as embodied in the "bone dry" law as a whole, Code Section 58-101 et seq., is repealed directly or by implication in Georgia in wet counties; but merely held that the act of 1937-38 (Ga. L. 1937-38, Ex. Sess., p. 103, 11, as embodied in Code, Ann. Supp., Section 58-1029) was a part of a later revising statute which clearly covered the whole subject-matter of an older statute, as embodied in the act of 1890-91, (Ga. L. 1890-91, pp. 132, 133; Code, Ann. Supp., Section 58-601) and that the older act as embodied in Code, Ann. Supp., Section 58-601 was impliedly "repealed or suspended" by the later act of 1937-38 (Ga. L. 1937-38, Ex. Sess., p. 103; Code, Ann. Supp., Section 58-1029) because it was necessary, on account of the repugnancy between them, in order to make the later act operative, to abrogate the older law and that the later act only abrogated the older law to the extent that it is inconsistent and irreconcilable with the later act. Some of the older general local option statutes, when dealing with

earlier general acts, "suspended" the prior general acts when a county had voted dry. Crabb v. State, 88 Ga. 584, 588 (supra). Some of the general local option acts, under like circumstances, used the words "removed from the operation of" the general act by the later general local option act. We think that in the Leonard case the court was using the words "repealed or suspended" more in the sense of suspended than repealed and that the Leonard case is not in conflict with what is said in the main opinion in that instant case.

In Mayes v. Daniel, 186 Ga. 345, 354(4), the only question presented in division four of that opinion was whether the act in question "violates art. 3, sec. 7, par. 17, of the Constitution, which declares: 'No law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made.' The plaintiffs allege: (1) Section 2 of said act seeks to amend a general law of the State by reference only to a title number of the Code. (2) Section 3 of said act seeks to amend a general law of the State by reference only to chapter number of the Code." The court decided this question as follows: "When we consider the manifest purpose of the constitutional provision, which was none other than that the members of the General Assembly should be fully put on notice of what law it was that the bill proposed to amend (See Fullington v. Williams, 98 Ga. 807, 810, 27 S. E. 183), and reading the act itself, we can not believe that the act should be struck down by reason of any repugnancy to the provision of the Constitution above quoted." Any other statement of law in division 4 of that opinion enunciated by the court by way of illustration, argument, analogy, or suggestion was not essential to the determination of the question there presented and is obiter dictum.

This same idea, as expressed in Mayes v. Daniel, supra, is expressed in Barber v. Housing Authority of the City of Rome, 189 Ga. 155, 159 (5 S. E. 2d, 425), thus: concerning the rule where there is a failure to describe sufficiently, under art. 3, sec. 7, par. 17, of the Constitution, an act to be

amended, the purpose of the requirement is to put the members of the General Assembly on reasonable notice as to the law intended to be amended or repealed so that they may ascertain if and how an old law is intended to be modified. This later case cites and relies upon the Mayes case, supra; as authority and cites Fullington v. Williams, supra; Adam v. Wright, 84 Ga. 720 (11 S. E. 893); Town of Maysville v. Smith, 132 Ga. 316, 318-320 (64 S. E. 131); Tyson v. Doerun, 155 Ga. 367 (2), 371 (116 S. E. 615); Holland v. State, 155 Ga. 795 (2), 800 (118 S. E. 203).

The statement in Womack v. State, 60 Ga. App. 761, 762 (5 S. E. 2d, 96), upon which counsel for defendant relies, that in wet counties "the old law, making it a penal offense to possess whisky or to keep it for sale at a place of business, has been directly repealed," we think, is not an accurate statement. While the statement is too broad, the case was correctly decided on its particular facts, but we think that the effect of the act of 1937-38 (Ga. L. 1937-38, Ex. Sess., p. 103), which permits counties to vote wet, was merely intended to suspend or remove the liquors therein described from the operation of the law as stated in Code Section 58-101 et seq.

Where a county has voted wet under the provisions of the act in question, as amended, that county can be restored to its former dry status by merely holding an election under the provisions of such act as amended. No new statute repealing this act, which permits a county to vote wet, is necessary in order for the wet county to return to its dry status; for, under the act in question as amended, by an election as provided for therein the suspension of the general prohibition law, which had been brought about by the county's voting wet, could be removed and the county thereby restored to its dry status. Thus, under this act as amended a county may alternately at its pleasure, within the limitations of the statute, vote wet or vote dry.

We do not think that the act of 1937-38 (Ga. L. 1937-38 Ex. Sess., p. 103) directly repealed the entire general prohibition law in wet counties.

Rehearing denied. Gardner and Townsend, J. J., concur.

—Bienert v. State, 82 Ga. App. 179.

EXHIBIT "C"

Possession of more than quart in dry county, misdemeanor.—Any person found in possession or control of more than one quart of spirituous, vinous, or alcoholic liquor, in any county of this State (except such counties in which liquor may be legally sold or transported under the terms of this Chapter) shall be guilty of a misdemeanor and, upon conviction, punishable as in cases of misdemeanors. The fact that such person may have a license or liquor stamps shall be no defense in such prosecutions, where said liquor is carried into a county to which the terms of this Chapter do not apply, and wherein liquor is not legalized under the terms of this Chapter.

—58-1077, Code of Georgia Annotated, 1933

Other liquor laws remain in force in counties not adopting this Chapter.—It is the purpose and intent of section 58-1077 to maintain the present prohibition law against liquor and alcoholic beverages in those counties of this State not specially exempted from the provisions of the prohibition law under this Chapter; and to provide for the trial and conviction of persons guilty of selling or possessing such liquor in such counties, as is now provided by law unless exception is made herein, prior to the passage of this Chapter, and it is for the purpose and intent of said section to provide that the prohibition law is not repealed in Georgia, except in the counties which have by a majority vote voted this Chapter into operation.

58-1078, Code of Georgia Annotated, 1933

Chapter not to apply in counties adopting legalization.—The limitations and restrictions of this Chapter shall not apply to those counties in which a majority of those voting at an election held for the purpose vote in favor of the taxing and legalizing and controlling of alcoholic beverages and liquors as may be provided by the General Assembly.

—58-124, Code of Georgia Annotated, 1933

Chapters 58-1, 58-2, 58-3 not applicable in counties adopting legalization under Chapter 58-10.—Nothing in Chapters 58-1, 58-2, and 58-3 of this Code shall apply in those counties in which a majority of those voting at an election held for the purpose vote in favor of the taxing and legalizing and controlling of alcoholic beverages and liquors as provided in Chapter 58-10.

—58-306, Code of Georgia Annotated, 1933